

1 same thing.

2 MS. GOSSE: They will have to go
3 through --

4 MR. KNOWLES-KELLETT: We can ask.

5 MR. SCHONMAN: The request doesn't
6 always mean get.

7 MS. GOSSE: But justification
8 would be that we need them for the hearing.

9 ADMIN. JUDGE SIPPEL: All right.
10 Okay.

11 Well, you see what we're up
12 against then, Mr. Marshall. That --

13 MR. MARSHALL: I do, Your Honor.

14 ADMIN. JUDGE SIPPEL: But this is
15 sort of working in your favor, because this
16 will then just give you some more time.

17 But it doesn't convince me that
18 you should be getting any more time beyond 9
19 October to do what I'm requiring you to do.

20 Now, okay. So that's going to be
21 noted. And I'm going to write this all in an
22 order so that it's clear. But you know what

1 you're going to do on 9 October.

2 Now the next question then is, I
3 can get to some of the outstanding items on
4 the motions to compel, which there are only a
5 few items that I'm concerned about. Do we
6 want to do that first, or do you want to do
7 other witnesses? Why don't we talk about
8 other witnesses?

9 MR. SCHONMAN: Very well.

10 ADMIN. JUDGE SIPPEL: Do you have
11 any idea, Mr. Marshall, and you don't have to
12 disclose who they are, but do you have any
13 idea of other witnesses that you might want to
14 testify?

15 MR. MARSHALL: I do, Your Honor.
16 And my understanding, from speaking to Mr.
17 Schonman and Mr. Knowles-Kellett last week, is
18 that they would not likely require any
19 witnesses who provided character testimony to
20 come to Washington for cross examination. So
21 I don't see any particular problem in that
22 area.

1 MR. SCHONMAN: Your Honor --

2 ADMIN. JUDGE SIPPEL: Go ahead.

3 MR. SCHONMAN: When I spoke about
4 testimonial evidence with Mr. Marshall last
5 week, we indicated that in past cases where
6 there had been testimonial provided that there
7 were instances where we did not call those
8 individuals for cross and that their brief
9 statements about the character of the licensee
10 was allowed to come in unchallenged. That may
11 be the case, and I want to stress it may be
12 the case.

13 ADMIN. JUDGE SIPPEL: Well, you
14 have to see the statements first?

15 MR. SCHONMAN: Of course. Of
16 course.

17 ADMIN. JUDGE SIPPEL: I mean, I
18 have many cases where that procedure has been
19 followed in the past. And I will certainly
20 use as much of my influence to see that it
21 gets done that way, to have it done that way.

22 But on the other hand, obviously I

1 can't make any definitive ruling on that until
2 we see what the statements say. And maybe the
3 answer would be to just -- that might be a
4 situation where maybe the depositions would be
5 taken, and we could take the depositions as
6 testimony if their statements are too wishy-
7 washy. I don't know. I'm not going try and
8 predict what might be the outcome.

9 In any event --

10 MR. SCHONMAN: Your Honor, we're
11 trying to accommodate Mr. Marshall. And we
12 understand that there may be financial
13 circumstances.

14 And therefore, with respect to
15 testimonial -- I'm sorry, character references
16 -- character reference statements that we
17 might be able to accommodate Mr. Marshall on
18 that.

19 We would strongly take a different
20 stance with respect to an expert witness who
21 would provide very important testimony in this
22 case --

1 ADMIN. JUDGE SIPPEL: Okay.

2 MR. SCHONMAN: -- if he decides to
3 bring one.

4 ADMIN. JUDGE SIPPEL: Right. So
5 that's the tentative position of the Bureau on
6 the character witnesses.

7 What about other types of
8 witnesses? Are these the kind of witnesses
9 that you're contemplating at this point, Mr.
10 Marshall?

11 MR. MARSHALL: Yes, Your Honor.
12 Of course, I don't have the police reports and
13 many other documentation that's to be
14 provided. But so far, that's all I'm
15 contemplating.

16 ADMIN. JUDGE SIPPEL: All right.
17 How many of those off the top of your head
18 would you say you might be thinking about?

19 MR. MARSHALL: I think it would be
20 fewer than a half a dozen.

21 ADMIN. JUDGE SIPPEL: Okay. Under
22 12. Okay. That's the take of that, I guess.

1 Were you planning to depose
2 anything on the Bureau's side?

3 MR. MARSHALL: No, Your Honor.

4 ADMIN. JUDGE SIPPEL: All right.

5 And you do have a list. I know
6 that there was a list of six or seven people
7 that they've interviewed. You've got those
8 with their addresses and everything?

9 MR. MARSHALL: Yes, that's
10 correct.

11 ADMIN. JUDGE SIPPEL: Okay.
12 Nothing from that end of it should be a
13 distraction or a delay for you and Mr. Titus.

14 MR. MARSHALL: That's right. In
15 terms of taking depositions, Your Honor is
16 that what you were asking about?

17 ADMIN. JUDGE SIPPEL: Well,
18 whatever it is. I mean, you might want to
19 just go out and talk to these people, whether
20 you want to depose them, or whatever it is
21 that you intend to do.

22 MR. MARSHALL: We'll either rely

1 upon informal interviews or not even do that.
2 I'm not planning to do any depositions.

3 ADMIN. JUDGE SIPPEL: All right.
4 Well, that's the magic word.

5 All right. Do you want me to go
6 through this discovery to the extent that I've
7 done it? I've gone through it pretty fast.

8 MR. SCHONMAN: Your Honor, if I
9 might ask about the other witnesses.

10 Is there a date by which Mr.
11 Marshall will let us know about these other
12 witnesses, and identify them? And although we
13 wouldn't at that point ask for their
14 statements, but at least a paragraph or a
15 blurb describing what it is they intend to
16 state about Mr. Titus?

17 ADMIN. JUDGE SIPPEL: Well, you
18 know what I'm going to do is I'm going to
19 leave that up to you all to start that
20 process. In other words, the 9 October is the
21 cut-off date on the -- that's the big issue on
22 witnesses and discovery.

1 Why don't I give you ten days from
2 that point, since we're going to have a
3 problem with the continuing resolution anyway?
4 Let's see. I'll give you until the 16th,
5 which would be a week, Tuesday, a week from
6 the 9th, and on 16 October that you all come
7 in with proposed dates for everything else.

8 Does that give you enough time?

9 MR. SCHONMAN: And that would be
10 dates by which Mr. Marshall identifies
11 whatever expert witness he intends to bring in
12 and any other witnesses for whom he intends to
13 present testimonial evidence?

14 ADMIN. JUDGE SIPPEL: Yes.
15 However you want to work it out. Yes.

16 I mean, if you want a specific
17 date for this, this, this, this, and this to
18 be done, including all the way up to the
19 hearing, can you give me proposed dates on the
20 16th of October? If you can't agree on them,
21 then I'll get your respective filings, and
22 I'll make the decision.

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1 MR. SCHONMAN: Just a minute, Your
2 Honor.

3 ADMIN. JUDGE SIPPEL: Go ahead.
4 We're off the record while they confer.

5 (Whereupon, at 10:58 a.m., off the
6 record until 10:59 a.m.)

7 MR. SCHONMAN: In order to
8 facilitate any depositions that we would want
9 to take, it would assist the Bureau if we know
10 the universe of people who Mr. Titus intends
11 to call on his behalf.

12 We know on October 9th we will
13 know whether he's going to call an expert
14 witness. Assuming he does intend to call an
15 expert witness, it would help us to have a
16 date certain by which he identifies that
17 person and also any other persons he intends
18 to call and testify as to his character. That
19 way we can make our decision about the
20 universe of people who we need to take the
21 deposition for while we're in Seattle.

22 We're going to plan a trip to

1 Seattle at some point. We don't know whether
2 it's going to be three days or six days or
3 eight days. And the only way we would know
4 that is by knowing the universe of people who
5 we want to depose. So we would wouldn't even
6 know how much money to ask for in terms of the
7 length of our stay until we know who we're
8 going to depose.

9 ADMIN. JUDGE SIPPEL: All right.
10 Let me ask Mr. Marshall.

11 Do you have a date in mind that
12 you could provide this information?

13 MR. MARSHALL: The identity of
14 witnesses other than an expert witness?

15 ADMIN. JUDGE SIPPEL: Identity of
16 the expert also. The identity of the expert,
17 and then the identity of any other witness
18 that you intend to call and for what purpose.

19 MR. MARSHALL: Well, Your Honor, I
20 think until I've done the work that is going
21 to be done by October 9th, I will not be able
22 to know that.

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1 ADMIN. JUDGE SIPPEL: All that I'm
2 asking for is a date. I mean, you've got
3 between now and sometime in October to come up
4 with these names.

5 MR. MARSHALL: But let's review
6 what I'm going to do by the 9th. That might
7 help me to answer this question.

8 ADMIN. JUDGE SIPPEL: Okay.

9 MR. MARSHALL: On the 9th, I will
10 inform you of whether we intend to call an
11 expert witness.

12 ADMIN. JUDGE SIPPEL: That's
13 correct.

14 MR. MARSHALL: I will inform you
15 of the costs we foresee for that. And I'll
16 provide you a financial statement from Mr.
17 Titus that will support any claim he has that
18 it would not be feasible for him to -- it
19 would be unduly burdensome for him to have to
20 bring his expert witness to Washington for the
21 hearing. And I'll let you know that I intend
22 to make a motion for extraordinary relief to

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1 have that testimony provided instead by a
2 video deposition.

3 Am I right so far?

4 ADMIN. JUDGE SIPPEL: Yes. You
5 got it. That's good. That's good.

6 MR. MARSHALL: Okay. Okay.

7 Okay. So then I'll bring the
8 motion for extraordinary relief.

9 And until that's ruled upon, I may
10 not know whether I really can use this expert
11 witness. So I'm wrestling with this in my
12 mind.

13 ADMIN. JUDGE SIPPEL: Well, before
14 you file your motion, you're obviously going
15 to have to give us the name of this witness,
16 what his qualifications are or her
17 qualifications, and what she intends to
18 testify. In effect, you will have to have
19 your 26(b) statement.

20 MR. MARSHALL: Right.

21 ADMIN. JUDGE SIPPEL: And that
22 would be attachments or whatever to your

1 motion.

2 And then the only issue on the
3 motion would be whether or not I would be
4 prepared or would consider -- I mean, actually
5 maybe that would not be a good use of time
6 because until I see the deposition, I really
7 can't make an ultimate and final decision as
8 to whether or not I want this witness in court
9 or not. I really can't do that.

10 MR. MARSHALL: Yes.

11 ADMIN. JUDGE SIPPEL: I mean, I
12 can tell you that if your plight is as you're
13 suggesting it might be -- your client's
14 financial plight, I want to accommodate.

15 On the other hand, the Bureau has
16 a very strong position on this, and it's well
17 taken. So I don't want to just lightly say
18 that I'll do it until I see it.

19 So, there is an element of risk
20 here with that too. And I'm sorry that I have
21 to say it that way, but I really do. I really
22 have to reserve my discretion.

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1 MR. MARSHALL: Right. So if I
2 understand you, Your Honor, you're saying that
3 until the video deposition has actually
4 occurred, you wouldn't be willing to rule that
5 the video deposition could serve as the
6 testimony at the hearing?

7 ADMIN. JUDGE SIPPEL: That's
8 correct. That's correct.

9 The only extra expense would be
10 the videotaping. I mean, the Bureau would
11 still have to go out and take the deposition.
12 You'd have to pay for the deposition for your
13 witness.

14 I don't know how much the cost
15 would be for the videotaping. I don't think
16 that would be that much more added cost.
17 You're still going to have to pay for a
18 deposition.

19 MR. MARSHALL: Yes.

20 ADMIN. JUDGE SIPPEL: And then I
21 get to have the transcript. And the video
22 comes with your motion for extraordinary

1 relief.

2 MR. MARSHALL: Right.

3 ADMIN. JUDGE SIPPEL: I'm sorry I
4 have to set it up that way. But that's all I
5 can do in light of the Bureau's position.

6 MR. MARSHALL: I understand, Your
7 Honor. And it's difficult for me to think
8 many steps down the line here because when I
9 discuss this with Mr. Titus and we discuss his
10 finances, your decision that you will not make
11 a final decision until after a video
12 deposition, that may kill the whole idea right
13 there. It may not be feasible for him to
14 spend that much money and then perhaps find
15 that he's invested in an expert witness whose
16 testimony he cannot use.

17 MR. SCHONMAN: Your Honor --

18 ADMIN. JUDGE SIPPEL: Well, you
19 could turn it around. You might be able to
20 take what's in the deposition -- you might be
21 able to make it into some kind of an
22 affidavit. I mean, it would obviously affect

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1 the weight.

2 There may be some way of getting
3 that evidence in without cross examination,
4 but its weight would be depleted quite a bit.

5 MR. MARSHALL: I see. Okay.

6 ADMIN. JUDGE SIPPEL: Unless the
7 Bureau is very impressed by what you did. I
8 don't know.

9 MR. SCHONMAN: Your Honor, at the
10 risk of belaboring the issue about the
11 justification for using a deposition at
12 hearing --

13 ADMIN. JUDGE SIPPEL: Yes.

14 MR. SCHONMAN: -- 1.321 carves out
15 the very, very limited circumstances under
16 which a deposition can be used at the hearing.
17 And it includes things like death of the
18 deponent, or out of the country for some
19 reason, or upon petition in which exceptional
20 circumstances are represented.

21 This whole discussion is about
22 using a videotaped deposition at hearing. And

1 it really is quite unorthodox in Commission
2 proceedings. And I would question whether
3 this particular case should be used as the
4 test case for employing this method.

5 I've been doing this for a number
6 of years, and I don't recall using a
7 videotaped deposition at a hearing when the
8 deponent/witness is available.

9 ADMIN. JUDGE SIPPEL: Well, I know
10 that we've used them. I don't say that "we"
11 in the sense of yourself being involved in a
12 case. But I have presided in hearings where
13 that has been done. But it's been done with
14 the consent of both parties.

15 MR. SCHONMAN: And probably to
16 contradict testimony at the hearing?

17 ADMIN. JUDGE SIPPEL: No. No.
18 No, it might be a peripheral issue. I've
19 received them on the merits of what they're
20 proffered for.

21 But it would be by agreement of
22 both sides. What it usually comes down to is

1 that certain parts of it come in for one
2 purpose. And then the opposing party wants
3 the whole thing in.

4 MR. SCHONMAN: Well, I think a key
5 statement that you just made is that from your
6 experience. If I understand it correctly,
7 it's been on a peripheral issue.

8 ADMIN. JUDGE SIPPEL: Well,
9 peripheral in the sense that that's true.

10 MR. SCHONMAN: My concern here is
11 that this testimony would be anything other
12 than peripheral. It would be right on point,
13 and be dispositive.

14 And under those circumstances, for
15 the reasons I've already expressed, the Bureau
16 would strongly oppose not having an expert
17 witness testify here live for cross
18 examination.

19 ADMIN. JUDGE SIPPEL: Well, I hear
20 you. I mean, I hear you. I'm not put off at
21 all by what you say.

22 I still think that Mr. Marshall

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1 should have the opportunity as I've outlined
2 it to proceed with this. And I'm not saying
3 this was in the back of my mind well, once I
4 get that motion for relief, I'm going to deny
5 it. I'm not looking at it that way at all.

6 It's hard for me to see that
7 you're not having an opportunity to --
8 certainly you're going to have an opportunity
9 to cross examine this witness. It's just a
10 question of whether or not you're going to
11 cross examine here in open court, or you're
12 going to do it out there in Seattle.

13 MR. SCHONMAN: But if I do the
14 deposition, I'm not cross examining him on any
15 direct testimony because he hasn't given any.

16 ADMIN. JUDGE SIPPEL: He has.
17 He's given the 26(b) statement. That's a
18 very, very succinct document. They can't go
19 out of the 26(b) statement if he were to come
20 in and testify live. He can't go beyond that.

21 Now he might say it in a different
22 way a little bit, but he can't go beyond that.

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1 And his conclusion is what you're interested
2 in. And his conclusion is locked in his or
3 her conclusion.

4 So I'm not convinced that it's not
5 doable. The only thing I am convinced that I
6 can't make a ruling until I see what it is
7 we're dealing with. That's how I feel about
8 this. Mr. Titus must want this thing very
9 much. That's the only thing I can conclude
10 today.

11 All right. So where are we?
12 Where are we on this now?

13 MR. SCHONMAN: We're talking about
14 dates of witnesses. We're reviewing what Mr.
15 Marshall's obligations are on a procedural
16 schedule.

17 ADMIN. JUDGE SIPPEL: Well, what I
18 want to do is give you, say, until the 16th of
19 October to see if you can up with -- 9th of
20 October you're going to know what it is about.
21 You're going to know that much more
22 information anyway about the expert. 16

1 October -- it seems to me that counsel should
2 be able to get together by phone and say okay,
3 here's what we have to do. We have to have a
4 cut-off date for discovery. That means the
5 deposition.

6 I don't know where Mr. Marshall's
7 going to stand on the number of witnesses he's
8 going to call, but you should have a pretty
9 good idea by the 16th of October. Wouldn't
10 you? Do you have an idea in mind of who these
11 people might be?

12 MR. MARSHALL: Yes. I think I
13 would have a pretty good idea by the 15th of
14 October, Your Honor.

15 ADMIN. JUDGE SIPPEL: So if he
16 gives you the number of character witnesses by
17 the 16th of October, you should be able to
18 work dates, use that as a starting date to go
19 down to the hearing date with all the
20 exchanges of documents and all that kind of
21 thing.

22 MR. KNOWLES-KELLETT: We need

1 names and at least a brief description of the
2 possible testimony to decide whether we need
3 to take their deposition so we can plan a
4 Seattle trip. And I don't know if that's the
5 16th, the 23rd.

6 But that's really the next thing
7 we need after the identification of the
8 expert.

9 ADMIN. JUDGE SIPPEL: Well, okay.
10 I don't know why I'm hesitating. You can do
11 that by the 16th, couldn't you? I mean, I'm
12 giving you until you get back in the office on
13 the 26th. I mean, you can pursue both tracks
14 at the same time --

15 MR. MARSHALL: Right.

16 ADMIN. JUDGE SIPPEL: -- with Mr.
17 Titus

18 You've bypassed the big one on the
19 9th. Your intention by the 16th of October,
20 the names of all your witnesses -- I'm not
21 saying rebuttal witnesses. But all your
22 witnesses on your case in chief including the

1 name of the expert.

2 And then you all can agree on a
3 date after that that the expert has to come in
4 with his 26(b) statement, and how you're going
5 to line things up after that.

6 I could do it, but I'm just
7 thinking that you all can do it better than I
8 can.

9 MR. MARSHALL: That sounds fine,
10 Your Honor.

11 ADMIN. JUDGE SIPPEL: And if you
12 can't do it, then I'll get right back into it.

13 I'm sorry, Mr. Marshall.
14 Counsel's conferring again.

15 How does that strike you, Mr.
16 Schonman?

17 MR. SCHONMAN: I think that would
18 work.

19 ADMIN. JUDGE SIPPEL: Good. Okay.

20 So, 16 October, and then let me
21 see. 16 October. Okay.

22 And then by 22 October, I just

1 want a brief status report to the effect that
2 everything's being worked on. You don't even
3 have to give the dates at that point. Yes.
4 Why can't you? You should be able to give me
5 the dates.

6 MR. KNOWLES-KELLETT: Subject to
7 funding.

8 ADMIN. JUDGE SIPPEL: Of course.
9 Everything's subject to funding.

10 But you should give me dates that
11 you've proposed to go out to Seattle to take
12 all these depositions. And then the
13 traditional dates after that; end of
14 discovery, exchange of cases, et cetera, et
15 cetera, et cetera.

16 And if you can't, then just let me
17 know you can't.

18 MR. SCHONMAN: That works.

19 ADMIN. JUDGE SIPPEL: At least
20 this is getting the train on a tighter
21 schedule.

22 So you've got actually four dates

1 to deal with: 26 September, 9 October, 16
2 October, and then 22 October. And I'll get an
3 order out on that today.

4 I could just say in general that
5 it seems to me that the discovery is coming
6 along okay. Here is one thing that there
7 seems to be a contest about. And that is
8 other cases similar to this one to be
9 identified.

10 And the objection is that it's
11 doing your legal research, Mr. Marshall. The
12 Bureau doesn't want to do legal research for
13 you, and I'm not about to require them to.

14 But it seems to me that what you
15 really are interested in is cases where there
16 has been a sitting down for a hearing, again
17 it's an application for one of these types of
18 licenses -- amateur license -- where there
19 have been allegations of some kind of sexual
20 misconduct. In other words, you're talking
21 about the Mitnick case.

22 And the Mitnick case, I don't know

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